

FEDERAL COURT OF AUSTRALIA

Kaur v Minister for Immigration and Border Protection [2017] FCAFC 184

Appeal from: *Kaur & Ors v Minister for Immigration & Anor* [2017] FCCA 844

File number: VID 406 of 2017

Judges: **DOWSETT, PAGONE, BURLEY JJ**

Date of judgment: 27 November 2017

Catchwords: **MIGRATION** – application for skilled visa – public interest criterion 4020 – evidence of provision of “bogus document” to assessing authority – whether the Tribunal misconceived its function or misapplied public interest criterion 4020(4) – whether Tribunal erred by failing to undertake inquiries – whether Tribunal should have exercised power to summons witness – appeal dismissed

Legislation: *Migration Act 1958* (Cth) s 363
Migration Regulations 1994 (Cth)

Cases cited: *AB v Minister for Immigration and Citizenship* [2007] FCA 910; (2007) 96 ALD 53
Le v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 875
Minister for Immigration and Citizenship v Le [2007] FCA 1318; (2007) 164 FCR 151
Minister for Immigration and Citizenship v SZIAI [2009] HCA 39; (2009) 259 ALR 429
Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20; (1995) 183 CLR 273
MZZGB v Minister for Immigration and Border Protection [2014] FCA 1052
Paduano v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 211; (2005) 143 FCR
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6; (2003) 214 CLR 1
Singh v Minister for Immigration and Border Protection [2017] FCA 1285
Snedden v Minister for Justice [2014] FCAFC 156; (2014) 230 FCR 82
SZMJM v Minister for Immigration and Citizenship [2010]

FCA 309

Date of hearing:	9 November 2017
Registry:	Victoria
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	36
Counsel for the Appellants:	Mr L Howard (Pro Bono)
Solicitor for the Appellants:	ASA Law (Pro Bono)
Counsel for the First Respondent:	Mr R Knowles
Solicitor for the First Respondent:	The Australian Government Solicitor
Counsel for the Second Respondent	The Second Respondent filed a submitting appearance, save as to costs.

ORDERS

VID 406 of 2017

BETWEEN: **BALIHAR KAUR**
 First Appellant

KAMALJIT SINGH
 Second Appellant

YUVRAJ SINGH
 Third Appellant

JAZZVEER SINGH BRAR
 Fourth Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
 Second Respondent

JUDGES: **DOWSETT, PAGONE, BURLEY JJ**

DATE OF ORDER: **27 NOVEMBER 2017**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The first and second appellants pay the respondents' costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. 1. INTRODUCTION

1 The appellants are Ms Balihar Kaur, her husband Kamaljit Singh and their two sons, Yuvraj Singh (who is now over 18 years of age) and Jazzveer Singh Brar (who is now aged 9). All are citizens of the Republic of India. On 13 December 2009 Ms Kaur applied for a Skilled (Provisional) (Class VC) visa (**Visa**) pursuant to the *Migration Act 1958* (Cth) (**Act**). Mr Singh and their sons applied for visas on the basis that they are members of the same family unit of Ms Kaur. Accordingly, the success or failure of Ms Kaur's visa application will determine the fate of the applications for the balance of her family; *Migration Regulations 1994* (Cth) (**Regulations**) Schedule 2, Part 487, reg 487.3.

2 In her Visa application, Ms Kaur nominated her occupation as "hairdresser" and stated that she had obtained a skills assessment from Trades Recognition Australia (**TRA**) on 19 March 2009. Her application was accompanied by a letter from TRA dated 19 March 2009, and a letter signed by Mr T (Mr T's name, and other details are confidential as a result of a suppression order) (**T letter**) as director and owner of a hairdressing salon (**salon**), which stated, amongst other things, that she had worked part time 15 – 20 hours per week in accordance with her student visa conditions and completed more than 900 hours of work for the salon.

3 On 3 November 2014 a delegate of the Minister for Immigration and Border Protection (**Minister**) refused to grant the Visa on the basis that she was not satisfied that Ms Kaur's application had complied with the criteria set out in Part 487 of the Regulations. More specifically, the delegate found the application did not satisfy the requirements set out in public interest criterion 4020 (**PIC4020**), because the T letter was a "bogus document".

4 On 24 June 2015 the Migration Review Tribunal (now the Administrative Appeals Tribunal) affirmed the decision of the delegate, and on 22 July 2015 the appellants applied to the Federal Circuit Court of Australia (**FCCA**) for judicial review of the tribunal's decision. On 24 March 2017 the FCCA dismissed that application.

5 On 21 April 2017 the appellants lodged an appeal to this Court. Initially, the Minister opposed the grant of leave to file the notice of appeal because it was out of time, however, on

the morning of the hearing consent orders were made granting leave and also granting leave to the appellants to file an amended notice of appeal in the following form.

The Court erred by failing to find that the Migration Review Tribunal's (the **Tribunal**) decision was affected by jurisdictional errors, as follows:

1. The Tribunal misconceived the nature of the function it was required to perform under PIC4020(4) of the *Migration Regulations* 1994 (Cth). Expressed differently, the Tribunal took into account irrelevant considerations, illogical reasoning or disproportionate reasoning.

Particulars

- (i) The Tribunal misconceived the nature and extent of the compassionate and/or compelling interests required to be considered in PIC4020(4)(a) and (b).
 - (ii) The Tribunal erroneously equated relevant considerations deriving from the *Convention on the Rights of the Child* to a test of whether the Third Appellant's and/or Fourth Appellant would survive, or would be afforded a basic standard of living, should the Appellants' visas not be granted.
 - (iii) The Tribunal, despite identifying Australia's compliance with Article 3 of the *Convention* as being relevant to the exercise of discretion in PIC 4020(4), failed to have regard to a relevant consideration by failing to treat the best interests of the child and/or children as a primary consideration.
 - (iv) Further or alternatively, the Tribunal failed to treat the best interests of the child and/or children as a primary consideration, by failing to identify or make a finding as to what the best interests of the child or children were.
 - (v) Further or alternatively, if the Tribunal did attempt to identify the best interests of the child and/or children, the Tribunal failed to have a proper, genuine and realistic consideration of those interests, including by failing to have regard to the fact that, if deported, the younger child would have to leave the community in which he was born and raised, and the loss of educational, social, cultural and lifestyle opportunities available to both children in Australia.
 - (vi) Further or alternatively, if the Tribunal did identify the best interests of the child or the children, the Tribunal failed to treat those interests as a primary consideration by failing to consider whether those interests were outweighed by other relevant considerations.
 - (vii) Further or alternatively, if the *Convention* was not required to be applied, and for the above reasons was not applied, the Tribunal failed to afford procedural fairness to the Applicants in that it failed to give notice that it proposed to make a decision which did not accord with the principles that the best interests of the children would be a primary consideration in the process.
2. The Tribunal failed to discharge its review function in accordance with section 348 of the *Migration Act* 1958 (Cth).

Particulars

- (i) In the face of all of the circumstances before it, the Tribunal could have

and, should have, summonsed [Mr T], an alternative representative of [the salon] disclosed in the record, or [Mr O] to appear and give evidence pursuant to section 363(3)(a) of the Act.

6 6 The appellants were represented at the hearing of the appeal by Mr Leigh Howard, who, together with his instructing solicitors, appeared on a pro bono basis. The Court thanks them for their assistance. The Minister was represented by Mr Richard Knowles, of counsel.

2. 2. THE RELEVANT LEGISLATION

7 7 At the time of the Tribunal decision, reg 487.3 provided that a mandatory requirement for the grant of a Visa is that the applicant satisfies PIC4020. The relevant form of PIC4020 (in force as at 24 June 2015), which is contained in Schedule 4 to the Regulations, provides as follows:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.....
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
 - (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;justify the granting of the visa.
- (5) In this clause:
information that is false or misleading in a material particular means information that is:
 - (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

8 8 Subsection 5(1) of the Act defines “bogus document” as follows:

5 Interpretation

- (1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...

3. THE TRIBUNAL

9 9 On 24 March 2015 the Tribunal wrote to the appellants inviting them to comment on or respond to information concerning the T letter. Specifically, the Tribunal informed them that it had information relating to the alleged fraudulent production of a false work experience reference by the salon. The letter provided details of an investigation that had been conducted into the conduct of a Mr A, who had allegedly assisted applicants for visas to provide fraudulent documentation, including false work references and the like. The fraud allegedly took place between 2006 and 2009 and involved the creation of 777 false documents. Investigations made of employers revealed that persons nominated in the work references had not completed 900 hours of work experience at their business and that many of them did not attend the business at all or only attended for a few days. Some of these employers confirmed that they had received money from Mr A in return for allowing their business name to be used in the false documents created by him. The letter advised that the Tribunal had been provided with a list of the employers allegedly involved in the fraud and the types of documents that Mr A had organised to be falsely issued to applicants. Mr T from the salon was amongst the employers listed. Mr A had made a number of admissions in relation to his conduct including an admission that he had created false work references so that students could obtain a skills assessment and permanent residence in Australia. The letter informed the appellants that an extract from a spreadsheet of exhibits submitted to the Victorian County Court in relation to charges against Mr A included an electronic version of the work reference from the salon in Ms Kaur's name and with her date of birth. The Tribunal's letter quoted PIC4020 and the definition of "bogus document", and indicated that Ms Kaur's review application may fail if the Tribunal makes a finding that there is evidence

that Ms Kaur does not satisfy the requirements of PIC4020(1), and if the Tribunal makes findings that she does not meet the requirements of PIC4020(4).

10 10 The appellants provided a detailed response to the Tribunal's letter in the form of a written submission prepared by her legal representatives (then, Carina Ford Lawyers) dated 14 April 2015, and a statement from Ms Kaur of the same day, the latter of which asserted that she had spent the requisite number of hours working at the salon. The statement relevantly included the following:

15. I have worked as a volunteer without any wages (which was a condition) and employer has exploited me without paying anything. I have performed most of the duties while working there even sometimes I have trained the other students, some of these were international students including one from India and two from parts of Asia, as they used to come for volunteer work at the same time.

16. I do not know how to prove a volunteer work because I don't have any pay slip from [the salon]. If it had been paid work I would have been able to prove that I did it. I have the proof of contact details with my employer [the salon]. I am trying to arrange a copy of my bill to evidence that I was in contact with them at the time.

...

19. I kept trying to call [Mr T] and one day he answered my phone call that very rudely. He said "Do not call me ever again". From that day on I kept on trying to chase him but was unsuccessful. I have tried to contact [Mr T] ([the salon's] owner), the receptionist ([C]) and the other staff that was working there with me, however most of the staff left due to the management change and [Mr T] never bothered to return my call or meet me. We don't understand what exactly happen to him who was at one point appreciating my work.

...

23. My request to the department is to ask [Mr T] to prove that I haven't work at his salon and to take oath in the court and show any evidence that can prove me wrong.

11 11 On 18 May 2015 the appellants' immigration lawyers filed a further written submission which urged, amongst other things, that in considering PIC4020(4) the Tribunal should take into account the interests of the fourth appellant (**Jazzveer**), who at the time was 7 years old and in year 2 of primary school. The submission noted that the United Nations *Convention on the Rights of the Child* (**Convention**) requires that primacy in any decision-making process be given to the best interests of a child.

12 12 The decision of the Tribunal includes reference to the matters mentioned above. It records that Ms Kaur gave evidence during the course of the hearing, during which she was

tested on her evidence that she had in fact spent 900 hours performing voluntary work at the salon. At [22] of the decision the Tribunal states that its preliminary view was that there appeared to be evidence to indicate that Ms Kaur's work reference from the salon was a bogus document, being the evidence of Mr A implicating both Ms Kaur's former agent and Mr T and the salon in colluding with him to produce work references falsely claiming that she had undertaken 900 hours of work experience, and the lack of any other corroborating evidence of Ms Kaur's work experience at the salon. At [21] the Tribunal records that Ms Kaur said that she would try to contact the salon again to see if she could obtain a letter confirming that she had worked there, but that she was not hopeful of being successful due to her past experience.

13 13 It is appropriate at this point to refer to the transcript of the hearing before the Tribunal. At the conclusion of the hearing the following exchange took place:

Tribunal: ... Just coming back to the issue of a further attempt to get a work reference or you know. My preliminary thought is this. That is up to you. If you want to make another attempt I will allow two weeks for you to provide something further to me but I am going to leave it to you Mrs Kaur as to what can be obtained. At the end of that two weeks, I'll then be in a position to make a decision on the available evidence whether that includes anything that you've been able to obtain or not. I don't think there is anything further I can say.

Representative: No, that's fine.

14 14 At [31] the Tribunal records that it subsequently received a further submission from the first appellant's solicitor advising that, despite extensive efforts, Ms Kaur had been unable to obtain further evidence of her work experience at the salon.

15 15 Ultimately, the Tribunal expressed its satisfaction that Ms Kaur gave, or caused to be given, to TRA the document purporting to be a work reference for her from the salon. TRA then issued her with a skills assessment based on the salon's work reference. The Tribunal was satisfied that Ms Kaur subsequently gave the TRA skills assessment to the Department in relation to the application for her Visa. Accordingly, the Tribunal found that it had probative evidence before it that Ms Kaur provided, or caused to be provided, a bogus document in relation to her application. That finding is not challenged in the present appeal.

16 16 The Tribunal then considered whether the requirements of PIC4020(1) or (2) should be waived on the basis of subparagraph (4). It addressed a number of submissions made on behalf of the appellants which are not now relevant, before turning to the question of whether there exist any compelling circumstances that affect the interests of Australia within

PIC4020(4)(a) as a result of the position of Jazzveer and Australia's position as a signatory to the Convention.

17 17 It found as follows:

Australia as a signatory to the UN Convention on the Rights of the Child (CROC)

76. The applicants' agent argued that the third and fourth named applicants' interests were covered by the CROC, and that as Australia is a signatory to the CROC, it would not be in Australia's interests to act contrary to its provisions; therefore, not doing so would be a compelling circumstance that affects Australia.

77. As discussed at the hearing, the Tribunal undertook to consider this issue carefully, since the waiver provisions are clearly aimed at, and limited to, the interests of Australia or Australians.

78. The Tribunal accepts that Australia is a signatory to the CROC. Article 3 of that Convention requires that, in all actions concerning children, the best interests of the child should be taken into account as a primary consideration. Article 6.2 provides that parties should ensure to the maximum extent possible the survival and development of the child. Article 9.1 provides that parties should ensure that a child should not be separated from his or her parents against their will, except when competent authorities determine that such a separation is necessary for the best interests of the child. Article 27 provides that states recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual and social development.

79. The Tribunal accepts that it is not in the interests of Australia to ignore its international obligations or the best interests of the fourth named applicant in particular. The Tribunal is satisfied that the third and fourth named applicants will not be separated from their parents as, if the visa refusals are affirmed, the family would return to India together.

80. The Tribunal accepts that the fourth named applicant is attending primary school in grade 2 where he appears well settled and to be progressing well. It accepts that it would be disruptive for the fourth named applicant to have to relocate to India and enter the educational system there. It also notes that the first and second named applicant are concerned that their standards of living will be lower in India, and the fourth named applicant (and the third named applicant) will have fewer opportunities than they would if they remained in Australia.

81. However, the Tribunal is not satisfied that the change to their standard of living would be below adequate if the family returned to India, nor it is satisfied that the disruption would have a significant or permanent effect on the third or fourth named applicants, although it acknowledges that it would not be easy for them to adjust initially. The Tribunal is not satisfied that their survival or basic standards of living and access to education would be jeopardised if they left Australia to the degree that it would breach articles of the CROC set out above.

82. In the absence of evidence that the CROC would be breached in relation to the return of the third and fourth named applicants to India, the Tribunal does not accept that there are compelling circumstances that affect Australia on that basis.

The Tribunal has considered the above factors singly and cumulatively but is not satisfied that the requirements should be waived on the basis that there are compelling circumstances affect the interests of Australia, or that there are

compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the granting of the visa.

83. Therefore, it finds that the requirement of cl. 4020(1) should not be waived.

4. THE DECISION OF THE FCCA

18 The appellants applied to the FCCA to review the decision of the MRT. It is unnecessary to discuss the primary judge's reasons, save to note that he was not satisfied that the decision of the Tribunal was affected by jurisdictional error, and dismissed the application.

5. CONSIDERATION OF THE GROUNDS OF APPEAL

5.1 Ground 1 of the appeal

19 Public interest criterion 4020(4)(a) provides that the Minister may waive the requirements of any or all of (1)(a) or (b) and subclause (2) if satisfied that compelling circumstances that affect the interests of Australia justify the granting of the visa.

20 The appellants contend that the purpose of sub-paragraph (4) is to protect against the potentially capricious operation of (1) and that by the Executive ratifying the Convention, Australia has given a solemn undertaking to the world at large that it will "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies" make "the best interests of the child a primary consideration", citing *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273 at 301 (Toohey J) and at 285, 287 (Mason CJ and Deane J). They further contend that the Tribunal correctly satisfied itself that compliance with the Convention constituted compelling circumstances that affect the interests of Australia within PIC4020(4)(a). As a consequence, the appellants contend that the Tribunal was obliged to take into account the best interests of Jazzveer in accordance with the Convention, and in particular by considering what is best for his health, social, linguistic and educational development, his identity, culture and citizenship prospects, and weigh these factors in the balance against other factors. In failing to take these steps, the appellants contend that the Tribunal fell into jurisdictional error.

21 We reject these submissions for the following reasons.

22 First, the incorrect premise underlying the appellants' arguments is that the Tribunal was under an obligation to apply the Convention. In the absence of express provision, unenacted international obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error; *Snedden v Minister for Justice* [2014] FCAFC 156; (2014) 230 FCR 82 (***Snedden***) at [147] (Middleton and Wigney JJ, Pagone J agreeing at [242]); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at [101]; *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875 (***Le***) at [59]; *AB v Minister for Immigration and Citizenship* [2007] FCA 910; (2007) 96 ALD 53 at [22]. There is no such express provision in PIC4020(4) or in the Act.

23 In the present context, the observations of French J (as he then was) in *Le* at [59] are particularly apposite:

There is nothing in s 501 which expressly requires that the Minister have regard to the best interests of the visa holder's children as a condition of the valid exercise of the cancellation power. Nor is there anything in the language of the Act to support an implication to that effect. In the international context, Australia is a party to the Convention on the Rights of the Child and therefore is bound, in international law, by the obligation, in legislative, executive and judicial decision-making to treat the best interests of the child as a primary consideration 'in all cases concerning children'. However the existence of that obligation at international law does not, unless incorporated by the Parliament into domestic legislation, give rise to a corresponding substantive obligation which conditions the exercise of statutory powers. The provisions of an international treaty to which Australia is a party may be a relevant consideration in the exercise of statutory discretions – *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 304 (Gummow J). Such considerations do not thereby become mandatory. In the joint judgment in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 at 527 [101], McHugh and Gummow JJ referred to the '... established doctrine' that obligations under international treaties '... are not mandatory relevant considerations attracting judicial review for jurisdictional error'. The best interests of the children do not, by virtue of Australia's commitments under the Convention, become a mandatory relevant consideration in the exercise of statutory powers and in particular the power of visa cancellation under s 501. It may be acknowledged that statutes are generally to be interpreted and applied, to the extent that their language allows, so as to conform and not conflict with established laws of international law – *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, and 80-81; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287. See also *Minister for Foreign Affairs and Trade v Magno* at 304 and the cases there discussed. But this rule of construction does not extend to writing into statutes conditions, expressive of treaty obligations, which would narrow the powers that Parliament has conferred upon administrative or ministerial decision-makers.

24 Secondly, the fact that the Tribunal chose to respond to the appellants' submissions as to the relevance of the Convention, and to consider whether the matters submitted concerning Jazzveer provided "compelling circumstances" did not make the consideration or application of the Convention a mandatory consideration; *Snedden* at [152].

25 Thirdly, by taking account of the Convention, the Tribunal would not in any event fall into jurisdictional error by misunderstanding the full extent or purport of the obligations. As Tracey J observed in *AB v Minister for Immigration and Citizenship* at [27]:

Australia's unenacted international treaty obligations relating to refoulment of persons within the jurisdiction are matters to which decision-makers are entitled to have regard when exercising powers under s 501 of the Act. In the absence of legislative requirement they are not, however, bound to do so. If they do not bring them into account as part of the decision-making process no jurisdictional error will occur. If they choose to have regard to treaty obligations but, in some way, misunderstand the full extent or purport of the obligations, this will not constitute jurisdictional error. It has been held that misconstruction of a ministerial policy, by a Minister who is free to depart from it, cannot amount to reviewable error: see *Nikac v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 20 FCR 65 at 77-78. Where the instrument concerned is an unincorporated international treaty which is subject to interpretation by a potentially wide range of international bodies it will be harder to make good an allegation of error much less jurisdictional error.

26 Fourthly, PIC4020(4) sets up a two-staged inquiry. It obliges the decision maker first to be satisfied that there are "compelling circumstances". Only then may the decision maker go on to consider those circumstances in the application of his or her discretion. The appellants' argument conflates these inquiries. They submit that upon the involvement of any child in a visa application to which PIC4020 applies, the existence of the Convention comes into consideration as a compelling circumstance warranting the balancing exercise of the considerations involved. In our view, that does not represent a correct interpretation of the regulation. PIC4020(4)(a) imposes a filter, whereby the decision maker must consider that there exist "compelling" (that is, "forceful"; *Paduano v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 211; (2005) 143 FCR 204 at [32]-[37] per Crennan J) circumstances. In the present case, the Tribunal applied that filter at [82] to reject the appellants' submissions. We see no error in that approach.

27 Accordingly, in our view the Tribunal did not fall into error on the basis asserted in grounds 1(i) – (vi) of the Notice of Appeal, and the FCCA did not fall into error in concluding that the application should be dismissed.

28 In ground 1(vii) the appellants contend that if the Convention was not required to be applied, then the Tribunal failed to afford procedural fairness to them by failing to give notice that it proposed to make a decision which did not accord with the principle that the best interests of the children would be a primary consideration. However, it is apparent that it was the appellants, by their legal representatives, who themselves prosecuted the applicability of the Convention, and the appellants who made submissions on the subject. There can hardly be an absence of procedural fairness in those circumstances. Furthermore, at [27] the Tribunal noted that it had indicated to the appellants that in its view their circumstances were excluded from consideration under PIC4020. In any event we have found that there was no obligation arising under the Convention. There is no lack of procedural fairness in these circumstances. Accordingly, this ground is not made out.

5.2 Ground 2

29 In ground 2 the appellants contend that the Tribunal was obliged, in conducting its review, to undertake inquiries by exercising its power to summons witnesses and, in particular, Mr T and the former migration agent representing them. In this regard, the appellants draw attention to the request at [23] of the statement made by Ms Kaur on 14 April 2015 for the Department to ask Mr T to take the oath in court. They submit that by delegating its inquiries to Ms Kaur, and then proceeding to decide the review without making its own inquiries in the face of what it describes as her repeated attempts to secure Mr T's evidence, the Tribunal failed to fulfil its duty of review.

30 In our view this submission is misconceived.

31 The duty imposed upon the Tribunal by the Act is a duty to review. In the present case, the appellants were legally represented and had ample opportunity to issue a summons pursuant to s 363 of the Act to compel a witness to appear before the Tribunal. Indeed, as counsel for the Minister points out, in the appellants' response to the hearing invitation issued by the Tribunal, the appellants' then legal representatives supplied a form that indicated that the appellants declined the opportunity to take oral evidence from any other persons. In circumstances where, it may be inferred, a deliberate forensic decision was made on the part of the appellants not to seek the issue of compulsory process to compel the attendance of one or more relevant witnesses, it is difficult to conceive of how the Tribunal could have fallen into error by failing to do so itself.

32 In *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 259 ALR 429 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [25] said:

Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. ...

33 There is no general obligation to make inquiries, but as Kenny J noted in *Minister for Immigration and Citizenship v Le* [2007] FCA 1318; (2007) 164 FCR 151 at [60], an obligation may arise in "rare or exceptional circumstances". The mere fact that it may have been reasonable to make an inquiry does not mean the lack of such an inquiry amounts to a jurisdictional error; *SZMJM v Minister for Immigration and Citizenship* [2010] FCA 309 at [30] (Bennett J); *MZZGB v Minister for Immigration and Border Protection* [2014] FCA 1052 at [63] (White J); *Singh v Minister for Immigration and Border Protection* [2017] FCA 1285 at [64] (Murphy J).

34 The present case does not give rise to any such exceptional circumstance. The appellants were represented by solicitors prior to and after the Tribunal hearing. Before the hearing they were provided an opportunity to request the attendance of additional witnesses, but chose not to take it up. During the hearing the Tribunal member indicated that he would allow Ms Kaur a further two weeks to attempt to obtain further evidence, which her legal representative accepted without demur. At no stage did the appellants request to issue a summons to compel witnesses to attend to give evidence before the Tribunal. It is not necessary for us to infer that the appellants made a deliberate decision not to compel relevant witnesses to attend to give evidence for us to reach the conclusion that no exceptional circumstance arises in the present case. However, in the present circumstances that is an available inference.

35 We find that ground 2 is not made out, and accordingly, there is no jurisdictional error in the Tribunal's reasoning

6. DISPOSITION

36 The appeal must be dismissed with costs.

I certify that the preceding thirty six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Dowsett, Pagone, Burley.

Associate:

Dated: 27 November 2017